



Project Controls

E X P O

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**NEC4: how changes from NEC3 will impact procurement,
project & commercial management of projects**



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About the Speaker

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NEC4: how changes from NEC3 will impact procurement, project & commercial management of projects

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1. Recap - what's NEC4?

- NEC4 was published in June 2017
- NEC3 was first published in 2005
- NEC branded it evolution not revolution
- New features & forms of contract
- Greater consistency across the family
- Clarified & simplified in response to industry feedback

2. ECC & PSC main Options

ECC main Options A & B

- Uses a revised Short Schedule of Cost Components for CEs
- Defined Cost of people uses tendered *people rates*
- Defined Cost of Subcontractors based on Subcontract cost
- Percentages for people & design overheads have been removed
- Defined Cost of manufacture & fabrication & design outside Working Areas based on tendered rates

ECC main Options A & B

- ❑ One *fee percentage* applied to all Defined Cost (11.2(10))
- ❑ Defined Cost includes the cost of preparing quotations for CEs
- ❑ New provision for Contractor to correct Activity Schedule so that it relates to Scope (55.1)
- ❑ New provision for incentivising Contractor to propose value engineering of Scope (16):
 - *value engineering percentage*, standard is 50% unless changed in Contract Data (63.12)

ECC main Options C, D & E

- Uses a revised (full) Schedule of Cost Components
- Removed option to use Short Schedule for CEs
- Defined Cost of people visiting Working Areas clarified
- Further clarifications to people component to ensure payments are related to work on the contract & are in accordance with a persons employment contract
- Payments in relation to people for meeting the law tightened – only covers contributions, levies & taxes

ECC main Options C, D & E

- Percentage for Working Areas overheads removed
- Defined Cost of manufacture & fabrication & design outside Working Areas based on tendered rates
- New provision allowing Contractor to finalise parts of Defined Cost (50.9)
- Activity Schedule is no longer revised if Contractor changes a planned method of working

PSC main Options A, C & E

- ❑ **Most radical of all changes made to NEC3 contracts**
- ❑ All main Options use Defined Cost instead of Time Charge
- ❑ Option A uses Short Schedule of Cost Components for CEs
- ❑ Assessments based on tendered People Rates & Subcontractor cost + Fee
- ❑ Options C & E use Schedule of Cost Components for payment & CEs
- ❑ Assessments based on people costs + % for support people and office overhead, & Subcontractor costs + Fee

NEC3 PSC main Option G

- Option G **removed** from NEC4: no call-off Option PSC
- Could use Term Service Contract (amended) or the Framework Contract (limited to 4-years in UK / EU)
- Some clients are adding it back via Z clauses

3. ECC dispute resolution & secondary Options

ECC dispute resolution

- ❑ Now called “resolving & avoiding disputes” – emphasis on **avoidance**
- ❑ W1 & W2 include referral to *Senior Representatives* named in Contract Data
- ❑ Mandatory prior to adjudication in W1
- ❑ Used by agreement in W2 to comply with HGCR 1996
- ❑ W1 prevents Parties referring same or substantially the same dispute to adjudication in an attempt to achieve a different outcome (W1.3)

ECC dispute resolution

- ❑ New Option W3 for a Dispute Avoidance Board (DAB)
- ❑ Can only be used when HGCRA 1996 does not apply, i.e. cannot be used for most construction work in UK
- ❑ Straightforward amendments to give right to go to adjudication at any time could make it compliant
- ❑ Consists of 1 or 3 members, 3rd member jointly chosen
- ❑ DAB visits site regularly (stated in Contract Data)

ECC secondary Options

- ❑ **Option X1 (inflation)** – provisional indices not corrected
- ❑ **Option X2 (changes in law)** – PM cannot notify this as a CE
- ❑ **Option X4 (ultimate holding co.)** – replaces parent co. guarantee
- ❑ **Option X8 (undertakings to Others)** – from PSC, instead of warranties
- ❑ **Option X9 (transfer of rights)** – from PSC, was common NEC3 Z clause
- ❑ **Option X10 (information modelling)** – amended version of NEC BIM clauses

ECC secondary Options

- ❑ **Option X11 (termination by Client)** – moved from core clauses to align with PSC
- ❑ **Option X15 (Contractor's design)** – includes for professional indemnity insurance, document retention & use of material
- ❑ **Option X16 (retention)** – provides for a bond in lieu of cash retentions
- ❑ **Option X21 (whole life cost)** – Contractor proposals for reducing operational costs
- ❑ **Option X22 (early contractor involvement)** – incorporates clauses published by NEC in 2016

4. General & Contractor's main responsibilities

General

- ❑ Can specify an electronic communication system e.g. Fast Draft in the Scope to help improve contract compliance and control (13.2)
- ❑ Flexibility to have different *periods of reply* for different types of communication (13.3)
- ❑ **Risk Register** replaced with **Early Warning Register** & risk reduction meetings replaced with early warning meetings (15)

General

- ❑ Project Manager responsible for preparing first Early Warning Register & requires regular early warning meetings (15.2)
- ❑ Contractor not to commit Corrupt Acts, to takes action to stop a Corrupt Act of a Subcontractor or supplier & to include equivalent provisions in subcontracts & supply contracts (18)

Contractor's main responsibilities

- ❑ Contractor includes in subcontracts rights equivalent to those in the contract for the Client to use the Subcontractor's design (22)
- ❑ Contractors encouraged to subcontract on either unamended NEC terms or terms amended in accordance with the *conditions of contract* (26.3)
- ❑ Assignment & disclosure clauses added as these type of clauses were commonly added by industry as Z clauses (28 & 29)

5. Programme & time

Programme

- ❑ **NEC3** only dealt with the contents of the programme
- ❑ **NEC4** deals with the form also, e.g. a Gantt chart produced in a particular software format (31.2)
- ❑ **Deemed acceptance** of a programme submitted for acceptance (31.3)
- ❑ Requirements for a reminder from the Contractor then one week later deemed acceptance if no response from PM (31.3)

Time

- If PM instructs Contractor to stop or not start work, then may instruct removal from Scope or to re-start or start work (34.1)
- Acceleration – PM’s instruction to provide quotation only comes after PM & Contractor have **agreed** to consider the proposed change (36)

6. Quality & Defects

Quality

- New requirements for Contractor to:
 - operate a quality management system (requirements stated in the Scope) &
 - submit a quality policy statement & plan for acceptance
- NEC3 PSC approach applied to ECC (40)

Defects

- Supervisor issues Defects Certificate at the *defects date* if there are no notified Defects or the **earlier** of:
 - end of the last *defect correction period* &
 - date when all notified Defects have been corrected (44)
- Allows Defects Certificate to be issued earlier than in NEC3

7. Payment

Applications for payment

- Contractor obliged to submit an application for payment **before** not on each assessment date (50.2)
- Form of the application is to be stated in the Scope (50.2)
- Potentially heavy sanction for non submission of application (50.4)
- Likely that nothing will be paid**
- Removes NEC3 obligation for PM to assess amount due without an application

Final account

- ❑ Final account procedures introduced (53)
- ❑ PM assesses & certifies **no later than**:
 - 4 weeks after Defects Certificate or
 - 13 weeks after termination certificate
- ❑ If PM does not assess, **Contractor may issue assessment to Client**
- ❑ If Client **agrees**, final payment is made within 2 weeks (or other period in Contract Data as for other payments)
- ❑ Assessment is conclusive evidence of final amount due unless disputed

8. Compensation events

Compensation events

- ❑ **PM notifies Contractor that quotation for a proposed instruction is not accepted** – allows the Contractor to be reimbursed for cost & time spent producing quotations (60.1(20))
- ❑ **Additional CEs can be stated in Contract Data part one for specific project risks** – this was in NEC2 but removed from NEC3 (60.1(21))
- ❑ CEs can now be notified up until the Defects Certificate is issued, previously it was up until the *defects date* (61.7)

Compensation events

- ❑ New concept of a **dividing date** to clarify the switch date between actual & forecast Defined Cost for CE quotations
- ❑ Widely debated issue with NEC3 which (hopefully) NEC4 now resolves
- ❑ CEs arising from instructions, notifications, certificates or changed decisions – **dividing date is date of that communication**
- ❑ For other CEs – **dividing date is date of the notification of the CE** (63.1)

Compensation events

- Clarified which Accepted Programme to use for CE quotations – **it's the one current at the dividing date** (63.5)
- New clause 65 brings together all the provisions for proposed instructions

Summary – how to avoid nasty surprises?

- ❑ Ensure the Clients, Project Managers & Supervisors are **up to date with NEC4** before procurement commences
- ❑ **Educate** your staff & supply chain - help them to understand the changes
- ❑ **Understand** how the changes affect your tender evaluation models & ensure they **align** with NEC4

The devil is always in the detail!

Thank you for listening ...

